HARVARD
LAW REVIEW.

VOL. XXVII. DECEMBER, 1913. NO. 2.

THE EXERCISE OF JURISDICTION *IN REM* TO COMPEL PAYMENT OF A DEBT.

IN a previous article[1] the jurisdiction of courts over foreign persons has been examined. It remains to consider the power of a court to compel an absent defendant, through jurisdiction over property belonging to him, to discharge his obligations.

Jurisdiction *in rem* depends solely on the physical control of the *res* by the sovereign exercising jurisdiction.[2] A few exceptions to this general statement are to be sure established; thus where property is carried into a foreign territory without the coöperation or consent of the owner jurisdiction cannot be exercised.[3] These exceptions have no bearing on the general discussion and will be no further instanced or considered. The typical example of jurisdiction *in rem* is the jurisdiction of the Court of Admiralty over any vessel within the territorial waters of its sovereign.[4] But jurisdiction *in rem* is by no means confined to admiralty jurisdiction. Although in admiralty the subject of jurisdiction is personified and made a defendant, this is not necessary to the exercise of jurisdiction; a sovereign may subject a thing to the jurisdiction

[1] 26 HARV. L. REV. 193, 283.

[2] The Belgenland, 114 U. S. 355 (1885); Castrique *v.* Imrie, L. R. 4 H. L. 414 (1870); Story, Confl. Laws, § 592.

[3] See *e. g.* Cockburn, C. J., in the course of the argument in Cammell *v.* Sewell, 5 H. & N. 728 (1860); Edgerly *v.* Bush, 81 N. Y. 199 (1880).

[4] The Belgenland, 114 U. S. 355 (1885); The Bee, 1 Ware 336, 3 Fed. Cas. No. 1,219 (1836).

of his courts by other forms of process.[5] For instance, while a court of equity has, generally speaking, no jurisdiction *in rem* without the aid of statute, it may be given by statute jurisdiction over rights in land; and in that case it may exercise its jurisdiction to determine the title of all land within the territory,[6] or otherwise to deal with the land,[7] although the claimants are abroad. And this power is not confined to jurisdiction over land. The courts of a sovereign may also be empowered to determine the title to chattels,[8] or to foreclose liens or settle accounts,[9] although the owner of the chattel or the trustee of the estate is abroad. The jurisdiction *in rem* depends upon control of the thing at the time litigation is begun. If the jurisdiction is once exercised over a thing within the territory the subsequent removal of the thing out of the territory pending the litigation does not oust the court of jurisdiction,[10] although if anything else is substituted for the thing, as for instance if the thing, whether movable or immovable, is taken out of the court upon a bond being substituted in its place, the jursidiction over the thing ceases and cannot afterwards be exercised unless it is again brought within the power of the court on subsequent proceedings.[11]

---

[5] Holmes, C. J., in Tyler *v.* Court of Registration, 175 Mass. 71, 76, 55 N. E. 812 (1900).

[6] Arndt *v.* Griggs, 134 U. S. 316 (1890); Ormsby *v.* Ottman, 85 Fed. 492, 29 C. C. A. 295 (1898); McLaughlin *v.* McCrory, 55 Ark. 442, 18 S. W. 762 (1892); Loaiza *v.* Superior Court, 85 Cal. 11, 24 Pac. 707 (1890); Hollenback *v.* Poston, 34 Ind. App. 481, 73 N. E. 162 (1905); Felch *v.* Hooper, 119 Mass. 52 (1875); Short *v.* Caldwell, 155 Mass. 57, 28 N. E. 1124 (1891); Kidd *v.* N. H. Traction Co., 72 N. H. 273, 56 Atl. 465 (1903); Hardy *v.* Beaty, 84 Tex. 562, 19 S. W. 778, 31 Am. St. Rep. 80 (1892).

[7] Reconveyance: La Trobe *v.* Hayward, 13 Fla. 190 (1869). Partition: Williams *v.* Williams, 221 Ill. 541, 77 N. E. 928 (1906). Injunction against transfer: Tomson *v.* Tomson, 31 N. J. Eq. 464 (1879) Foreclosure: Cook *v.* Weigley, 68 N. J. Eq. 480, 59 Atl. 1029 (1905). Specific performance: Clem *v.* Gwen, 106 Va. 145, 55 S. E. 567 (1907). Establishment of trust: Porter L. & W. Co. *v.* Baskin, 43 Fed. 323 (1890); Pennington *v.* Smith, 69 Fed. 188 (1895); Reeves *v.* Pierce, 64 Kan. 502, 67 Pac. 1108 (1902).

[8] Wilson *v.* Graham, 4 Wash. C. C. 53, 30 Fed. Cas. No. 17, 804 (1821) (box); Loaiza *v.* Superior Court, 85 Cal. 11, 24 Pac. 707 (money) (1890); Gassert *v.* Strong, 38 Mont. 18, 98 Pac. 497 (trust in stock) (1908); Tomson *v.* Tomson, 31 N. J. Eq. 464 (money) (1879); Ward *v.* Arredondo, Hopk. 213, 14 Am. Dec. 543 (deed) (1824); Monroe *v.* Douglas, 4 Sandf. Ch. 126 (estate) (1846).

[9] Oswald *v.* Kampmann, 28 Fed. 36 (1886).

[10] The Rio Grande, 23 Wall. (U. S.) 458, 23 L. ed. 158 (1874); Wilson *v.* Graham, 4 Wash. C. C. 53, 30 Fed. Cas. No. 17, 804 (1821).

[11] Shields *v.* Coleman, 157 U. S. 168 (1895).

This power over things has always been exercised by courts for the enforcement of the obligations of absent owners. It is so palpably unjust that a debtor should be able, by putting his property outside the jurisdiction of the courts of his own domicil, to escape the compulsion of courts forcing him to discharge his obligation, that the court within whose jurisdiction his property has been thus placed by him should use its power over the property to give justice to the creditor. By proper action therefore the creditor may obtain payment of his debt out of the debtor's property, although he is unable to obtain personal service upon the debtor. The jurisdiction of the court to grant such remedy is obviously its jurisdiction over the *res* and nothing else;[12] but in that it is not dealing with the *res* because of any right asserted in the thing itself, this exercise of jurisdiction differs from the ordinary exercise of jurisdiction *in rem*, in which some existing claim upon the thing itself is asserted. To mark this distinction the phrase "jurisdiction *quasi in rem*" may be applied to this sort of jurisdiction.[13] It is in all essentials of jurisdiction the same as jurisdiction strictly *in rem*, so far as the property is concerned; but no power can be assumed over the person because of the power over his property, and no personal judgment can be rendered against the person for any excess of the debt over and above the amount realized from sale of the property seized.[14]

Since the jurisdiction is in reality a jurisdiction over the thing and since therefore no judgment against the person that he owes a debt may effectually be granted the proceeding must in some way be brought against the thing and not against the person. In other words, to obtain jurisdiction the process must be directed against the thing and the claim of the complaining party must in its terms be directed against the thing and not be a complaint against the debtor for failing to pay his debt.[15] This may be accomplished

[12] A court cannot seize and apply an equitable interest in land outside its jurisdiction. Butterfield *v.* Ogborn, 1 Disn. (Ohio) 550 (1857). A controversy as to the ownership of promissory notes in Tennessee, secured by mortgage of land in Mississippi, cannot be determined in Mississippi in the absence of the holder. Cocke *v.* Brewer, 68 Miss. 775, 9 So. 823 (1891).

[13] Freeman *v.* Alderson, 119 U. S. 185, 7 Sup. Ct. 165, 30 L. ed. 372 (1886).

[14] Freeman *v.* Alderson, 119 U. S. 185, 7 Sup. Ct. 165, 30 L. ed. 372 (1886); McVicker *v.* Beedy, 31 Me. 314 (1850); Eliot *v.* McCormick, 144 Mass. 10, 10 N. E. 705 (1887); Arndt *v.* Arndt, 15 Ohio 33 (1846); Jones *v.* Spencer, 15 Wis. 583 (1862).

[15] Pennoyer *v.* Neff, 95 U. S. 714 (1877) (no attachment); Starkey *v.* Lunz, 57 Or.

by a bill in which the court is requested to seize the property and apply it to the payment of the alleged debt. But the commonest form of proceeding is by some form of attachment of the property in which the request of the complainant for the attachment and sale of the property is the real gist of the complaint.

The attachment may either be the ordinary attachment of the property or the process which is called foreign attachment, trustee process or garnishment. This latter form of process will be separately considered later.

The attachment of tangible property offers no difficulty. Any property may, of course, be attached if the sovereign within whose jurisdiction it lies so wills. The fact that the property was not attachable in the place from which it came or in the place where the debt was contracted or in the place where the debtor lives is quite immaterial; thus the only exemption law which can prevail within the jurisdiction is the exemption law of that territory.[16] When, however, the question arises as to the power to attach commercial securities we meet with a somewhat embarrassing question. How far is a mercantile security a thing within the jurisdiction, or how far is it merely the evidence of an intangible chose in action? In ancient times the court undoubtedly regarded such securities as not in themselves chattels but as mere evidences of the existence of a chose in action. With the laspe of time, however, mercantile practice became otherwise. A bill of exchange, a certificate of stock, or even an insurance policy came to be a thing having value in itself and capable of being dealt with where it was. It becomes a question of much interest in the law whether this mercantile practice has resulted or should result in a change in the attitude of the court with respect to such securities. It is not intended in this place to examine this question in detail. One class of securities, however, presents consideration which may be of particular interest. The certificate of title to stock in a cor-

147, 110 Pac. 702 (1910) (attachment void); Cooper *v.* Reynolds, 10 Wall. (U. S.) 308, (1870).

[16] Chicago, R. I. & P. Ry. *v.* Sturm, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. ed. 1144 (1899); Boykin *v.* Edwards, 21 Ala. 261 (1852); Mineral Point R. R. *v.* Barron, 83 Ill. 365 (1876); Broadstreet *v.* Clark, 65 Ia. 670, 22 N. W. 919 (1885); Burlington & M. R. R. *v.* Thompson, 31 Kan. 180, 1 Pac. 622 (1884); Morgan *v.* Neville, 74 Pa. 52 (1873). But see Missouri Pac. Ry. *v.* Sharitt, 43 Kan. 375, 23 Pac. 430 (1890); Drake *v.* Lake S. & M. S. Ry., 69 Mich. 168, 179, 37 N. W. 70 (1888).

poration is commonly dealt with in the market as a commercial document of value and in an English case it has been held that it is so far a self operating document of value as to be assets at its situs.[17] The courts, however, almost unanimously hold that the presence of a certificate of stock within the jurisdiction gives no power to take the right evidenced by the certificate; [18] existing only on the books of the corporation, it can be attached only in that place where the corporation books legally exist, that is, at the domicil of the corporation.[19]

The question of foreign attachment or garnishment requires more consideration, and it is full of theoretical difficulties. Garnishment is a form of attachment in which the property attached is not taken directly by the sheriff but is reached in the hands of a third person holding it. He is warned (garni) to hold the property subject to the order of the court. The ordinary process of garnishment involves two actions: first an action of debt or contract is brought against a defendant to recover damages in the ordinary way; then it is alleged that he has property in the hands of a third person which cannot be come at in the ordinary way, and the third person is therefore called upon to come in with the property and hold it to abide the result of the first suit. The third person is brought into the action, but only as a stake holder. He is not charged as a wrongdoer, even though the suit involves the proof against him of a debt due to the principal defendant.

The process of foreign attachment or garnishment is based upon

---

[17] Stern *v.* Queen, [1896] 1 Q. B. 211.

[18] Pinney *v.* Nevills, 86 Fed. 97 (1898); Smith *v.* Downey, 8 Ind. App. 179, 34 N. E. 823, 35 N. E. 568 (1893); Armour Bros. Banking Co. *v.* St. Louis Nat. Bank, 113 Mo. 12, 20 S. W. 690 (1892); Plimpton *v.* Bigelow, 93 N. Y. 592 (corporation doing business in state; certificate does not appear to have been in state) (1883); Ireland *v.* Globe M. & R. Co., 19 R. I. 180, 32 Atl. 921 (1895) (same facts).

In Simpson *v.* Jersey City Contr. Co., 165 N. Y. 193, 58 N. E. 896 (1900), it was held that the certificate of stock in a foreign corporation could be attached, the certificate itself being in the state. Gray, J., said: "The truth is that it did have property here, in the common acceptation of the term, as well as in the eye of the law. Certificates of stock are treated by business men as property for all practical purposes. They are sold in the market, and they are transferred as collateral security for loans, and they are used in various ways as property. They pass by delivery from hand to hand, and they are [by statute] the subject of larceny."

[19] Wait *v.* Kern River M. M. & D. Co., 157 Cal. 16, 106 Pac. 98 (1909); People's Nat. Bank *v.* Cleveland, 117 Ga. 908, 44 S. E. 20 (1903); Young *v.* South Tredegar Iron Co., 85 Tenn. 189, 2 S. W. 202 (1886).

the custom of London of Foreign Attachment. The earliest full account of this custom that has been found is in an old book called "The City Law" published in 1647. As there described the process is as follows:[20] — "When a plaint of debt is brought before any of the said sheriffes testimony is given by the officer that the defendant hath not sufficient within the said city, and it is alleadged, that the defendant hath goods and chattels, or debts in other hands, or in others' keeping within the said city, and the plaintiffe prayeth that such goods and chattels may bee arrested and an extent may be made of the debts, then at the suit and suggestion of such plaintiffe such goods and chattels shall be arrested wheresoever they be found within the city, and an extent shall bee made of the debts, at the perill of the plaintiffe." The custom is stated in much the same terms in the Privilegia Londini.[21] In that work it is added "Note, the plaintiff ought to surmise that the other man who is indebted to the defendant is within the city; 22 Ed. 4, 30, per Starkey, Recorder of London, the custom so certified."

The custom of London became the custom of several colonies as a part of their common law. In New England, it takes the name of trustee process; in Pennsylvania, where the introduction of the custom was by statute, it is called foreign attachment. In most of the states of this country the process is called garnishment. But whether the process be permissible under the common law or depends upon the statute, it is in all cases really based upon the custom of London.

The jurisdiction for garnishment is obviously based upon the possession by the garnishee of property belonging to the defendant, which can be reached by the court because it is situated within the territory of the court. The proceeding to collect the principal claim is not itself *in rem*; and if the defendant in this proceeding is absent the court has no power to determine the principal claim; jurisdiction to apply the property to the payment of the alleged claim must therefore depend upon the actual situs of the property within the control of the court, or upon some power in the court over the property derived from some other circumstance.

---

[20] Page 42.

[21] Page 253.

In the case of a tangible chattel there is no difficulty whatever and no difference of opinion in the cases. The possessor of a chattel, in a suit against the owner of the chattel, cannot be garnished outside the jurisdiction in which he holds the chattel. Thus where a carrier is engaged in transporting goods he can be garnished in a suit against the owner in any state through which the goods pass, but only while the goods happen to be in transit through the state. He is not subject to garnishment either before the goods come into the state or after they have passed through it and gone into another.[22]

In the case of a chose in action evidenced by a document the case appears to be the same. If no attachment could be issued against the document itself no garnishment proceeding will lie against the possessor of the document. On this ground it has been held that a pledgee or other bailee who holds a certificate of stock within a state cannot be garnished in that state in a suit against the absent owner,[23] nor can a foreign corporation be garnished in a state in a suit against a foreign stockholder,[24] the court having no control over the *res*; since it has no power to attach, it has for the same reason no power to garnish.

When these considerations are applied to the garnishment of a debt great difficulty is at once felt. In its nature, a mere chose in action has no situs any where. This is not merely because it is intangible, for some intangible things, as has been seen, have a sort of location in connection with a tangible thing. Thus a share of stock has a sort of situs where the stock book is kept or rather where the corporation is domiciled; and a judgment has in the same sense a situs in the court which rendered it; the sovereign of the place having complete and sole power over it. Similarly the

[22] Western R. R. *v.* Thornton, 60 Ga. 300 (1878); Montrose Pickle Co. *v.* Dodson, 76 Ia. 172, 40 N. W. 705 (1888); Wheat *v.* Platte C. & F. D. R. R., 4 Kan. 370 (1868); Sutherland *v.* Second Nat. Bank, 78 Ky. 250 (1880); Clark *v.* Brewer, 6 Gray, 320 (1856); Pennsylvania R. R. *v.* Pennock, 51 Pa. 244 (1865); Bates *v.* Chicago, M. & S. P. Ry. Co., 60 Wis. 296, 19 N. W. 72 (1884).

[23] Winslow *v.* Fletcher, 53 Conn. 390, 4 Atl. 250 (1886); Christmas *v.* Biddle, 13 Pa. 223 (1850). The contrary opinion expressed in National Bank *v.* Lake Shore & M. S. R. R., 21 Ohio St. 221 (1871), and Puget Sound Nat. Bank *v.* Mather, 60 Minn. 362, 62 N. W. 396 (1895), is due to the expressed opinion of the court that shares of stock are taxable where the certificate is found, and not to any idea that an interest could be reached by garnishment that could not be reached by attachment.

[24] Ashley *v.* Quintard, 90 Fed. 84 (1898).

intangible thing called good will of a business is situated where the business is carried on. But an ordinary chose in action has no such situs. The only attempts to ascribe situs to a debt have been to fix it at the domicil of the creditor or of the debtor. It has been urged in many cases, especially in taxation cases, that the situs of the debt is at the domicil of the creditor, since it is a valuable thing in his hands. The answer to this is that it is not a thing at all in the hands of the creditor, but merely the legal power of getting a thing from the debtor. Its value to the creditor simply lies in the power it gives the creditor over the debtor. In so much as the creditor is richer by the possession of it, the debtor is poorer. It is, therefore, not a real thing, adding, like good will, to the wealth of the world, but merely a relation between the debtor and creditor, which is advantageous to one and detrimental to the other. The explanation of the power of taxing it at the domicil of the creditor is that as it adds to the creditor's wealth the power that may tax the creditor personally may exact the tax from him based on the ability which this power over the debtor gives him to pay the tax.

More specious efforts have been made to locate the debt with the debtor.[25] In favor of this location is the view the law originally took of the debt, that is, that it is a thing in the possession of the debtor and belonging to the creditor. The original nature of the action of debt as a real action, to recover from the debtor a thing held by him for the creditor, illustrates this conception of a debt.[26] It is to be noted, of course, that even if we hold this conception the debtor has no *specific* thing of the creditor in his possession which could be reached by attachment and therefore this sort of situs ought not to be regarded as sufficient for garnishment. But this conception of the nature of a debt has long since disappeared from the law, and the debtor is now regarded merely as a party to a contract for the payment of money, i. e., as one party to a chose in action.

Without basing any argument upon the original nature of the debt, modern courts have nevertheless suggested a situs of the debt where the debtor is for several purposes; of which the commonest is the administration of estates. A debt is alleged to

[25] Minor, Conflict of Laws, § 121. [26] Ames, Lectures on Legal History, 78.

be assets at the domicil of the debtor for the purpose of founding administration. If that were really the conception of the law it would follow that only in that place could the debtor be forced to pay his debt to the estate, and that the administrator in that place alone could make an assignment of the claim to collect it. The fact is, however, quite opposite. Any administrator may make a claim for payment upon a debtor who is only temporarily within his jurisdiction and may receive or even compel payment of the debt. All that is meant, then, by saying that the debt is assets where the debtor is domiciled is that administration may be taken out there on account of the debt, though there are no other assets. This is true, but it is for the very practical reason that there alone can an administrator be sure of reducing the claim to possession by a suit. In every other place the power to sue the debtor is dependent upon the accident of his being found within the state; at his domicil he may be sued whether he can be found there or not. The administrator at the domicil of the debtor is therefore the only administrator who can be *sure* of having jurisdiction to sue, and for this reason it is permissible to appoint an administrator there. An attempt has been made to extend this doctrine to the case of garnishment and to say that the debt is situated for the purpose of garnishment at the domicil of the debtor and only there. This is open to the same objection urged against the similar doctrine of the case of administration. The debtor may be sued in any place where he can be served with process. If the debt were situated at the domicil of the debtor it is quite clear that it could be discharged by proceedings in bankruptcy or insolvency. It has, however, been conclusively determined by the Supreme Court of the United States that an insolvent court at the domicil of the debtor cannot discharge him[27]; and this is settled law.[28] If he cannot be discharged in an insolvency or bankruptcy proceeding it would seem all the more that he cannot be discharged in garnishment.

The true doctrine would seem to be that a debt has in fact no situs anywhere; not merely because it is intangible but because as a mere forced relation between the parties it has no real existence anywhere. Like other such relations it may, of course, be controlled by the law, and by the courts as instruments of the law;

[27] Ogden *v.* Saunders, 12 Wheat. (U. S.) 213 (1827).

[28] Felch *v.* Bugbee, 48 Me. 9 (1859).

but the control must be obtained by making use of the relation. In order to control the relation the court must have the power to control both parties to it. Any court which has both debtor and creditor may compel a release from the creditor and an assignment of the action of the creditor. In other words if a debt is to be legally assigned or discharged it requires the action of both parties and especially the creditor, and the court which has to apply such a process must do so through its control over both parties.

The history of the law of garnishment, and the particular form which the action has taken — that is, the double action: first against the debtor, and then against the debtor's debtor, — have led the courts, it is submitted, into error as to the jurisdiction. It is in truth first an inquiry into a fact, the indebtedness, followed by the real judicial action, the seizure and application of the credit by suit against the garnishee. The courts have without sufficiently careful consideration assumed it to be two successive actions *in personam* against two parties.

Our process of garnishment was, as has been seen, derived from the custom of London [29] as to foreign attachment. The courts of London had jurisdiction over citizens only; and it could proceed upon such claims only as arose entirely within the city.[30] This, in the case of contracts, would mean such contracts as were performable in London, for instance, a foreign bill drawn on a London merchant.[31] Garnishment was subject to the same principles; and therefore no debt could be reached by foreign attachment unless it was due in London, and only a resident of London could be summoned as a garnishee.[32] When the custom was brought to this country, the question which was first raised was whether a debt due to a foreigner by another foreigner could be garnished in an action against the absent creditor; and it was rightly held that the custom of London allowed no such suit, and

[29] Other English cities had similar customs, *e. g.* Exeter. There is, however, no evidence that any other custom except that of London was brought to this country; but what is here said of the custom of London would equally apply to any local custom.

[30] Mayor of London *v.* Cox, L. R. 2 H. L. 239 (1867).

[31] Shand *v.* Du Buisson, L. R. 18 Eq. 283 (1874).

[32] "It is quite obvious, therefore, that the custom of foreign attachment cannot in reason apply to debts or garnishees out of the jurisdiction; and it is so settled by authority." Willes, J., in Mayor of London *v.* Cox, L. R. 2 H. L. 239, 266.

that the proceedings would not lie in such a case in this country.[33] Unfortunately the question whether the debt which formed the subject of garnishment was due within the state was not raised in the earlier cases; and this requirement of jurisdiction dropped out of judicial memory. Thus, we find that while careful courts forbade the exercise of garnishment where the garnishee was not resident within the jurisdiction, whether the garnishee was an individual foreigner[34] or a foreign corporation,[35] garnishment was allowed at the residence of the garnishee without inquiry as to where the garnished debt was payable,[36] and even in cases where the court noticed that the debt was a foreign one.[37] In a few cases the court, in deciding that a foreigner could not be reached by gar-

---

[33] Tingley *v.* Bateman, 10 Mass. 343 (where the court pointed out that garnishment seemed to be confined to debts arising within the jurisdiction); Redwood *v.* Consequa, 2 Bro. (Pa.) 62 (1811); Cronin *v.* Foster, 13 R. I. 196 (1881).

[34] Everett *v.* Connecticut Mut. L. Ins. Co., 4 Colo. App. 509, 36 Pac. 616 (1894); Nye *v.* Liscombe, 21 Pick. 263 (1838); Lovejoy *v.* Albee, 33 Me. 414, 54 Am. Dec. 630 (1851); Smith *v.* Eaton, 36 Me. 298, 58 Am. Dec. 746 (1853); McKinney *v.* Mills, 80 Minn. 478, 81 Am. St. Rep. 278, 83 N. W. 452 (1900); Sawyer *v.* Thompson, 24 N. H. 510 (1852); Lawrence *v.* Smith, 45 N. H. 533, 86 Am. Dec. 183 (1864); Straus *v.* Chicago Glycerine Co., 46 Hun 216 (affirmed in 108 N. Y. 654, 15 N. E. 444) (1888), Carr *v.* Corcoran, 44 App. Div. 97, 60 N. Y. Supp. 763 (1899); Baxter *v.* Vincent, 6 Vt. 614 (1834).

[35] Atchison T. & S. F. R. Co. *v.* Maggard, 6 Colo. App. 85, 39 Pac. 985 (1895); Green *v.* Farmers' & C. Bank, 25 Conn. 452 (1857); National Bank *v.* Furtick, 2 Marv. (Del.) 35, 44 L. R. A. 115, 69 Am. St. Rep. 99, 42 Atl. 479 (1897); Northwestern Life & Sav. Co. *v.* Gippe, 92 Minn. 36, 99 N. W. 364 (1904); Swedish-American Nat. Bank *v.* Bleecker, 72 Minn. 383, 42 L. R. A. 283, 71 Am. St. Rep. 492, 75 N. W. 740 (1898); Douglass *v.* Phenix Ins. Co., 138 N. Y. 209, 20 L. R. A. 118, 34 Am. St. Rep. 448, 33 N. E. 938 (1893); National Broadway Bank *v.* Sampson, 179 N. Y. 213, 71 N. E. 766 (1904); Wood *v.* Furtick, 17 Misc. 561, 40 N. Y. Supp. 687 (1896); Allen *v.* United Cigar Stores Co., 39 Misc. 500, 80 N. Y. Supp. 401 (1902); Balk *v.* Harris, 124 N. C. 467, 45 L. R. A. 258, 70 Am. St. Rep. 606, 32 S. E. 799 (1899) (reversed by Supreme Court of the United States); Strause Bros. *v.* Ætna F. Ins. Co., 126 N. C. 223, 48 L. R. A. 452, 35 S. E. 471 (1900); Renier *v.* Hurlbut, 81 Wis. 24, 50 N. W. 783 (1891).

[36] Molyneux *v.* Seymour, 30 Ga. 440, 76 Am. Dec. 662 (1860); Rothschild *v.* Knight, 176 Mass. 48, 57 N. E. 337 (1900); Dinkins *v.* Crunden-Martin Woodenware Co., 99 Mo. App. 310, 73 S. W. 246 (1903); Sexton *v.* Phoenix Ins. Co., 132 N. C. 1, 43 S. E. 479 (1903); Berry Bros. *v.* Davis, 77 Tex. 191, 19 Am. St. Rep. 748, 13 S. W. 978 (1890); Ward *v.* Morrison, 25 Vt. 593 (1853); Bragg *v.* Gaynor, 85 Wis. 468, 21 L. R. A. 164, 55 N W. 919 (1893).

[37] Tootle *v.* Coleman, 57 L. R. A. 120, 46 C. C. A. 132, 107 Fed. 41 (1901); Wyeth Hardware & Mfg. Co. *v.* Lang, 127 Mo. 242, 27 L. R. A. 651, 48 Am. St. Rep. 626, 29 S. W. 1010 (1895); Nichols *v.* Hooper, 61 Vt. 295, 17 Atl. 134 (1889); Hawley *v.* Hurd, 72 Vt. 122, 52 L. R. A. 195, 82 Am. St. Rep. 922, 47 Atl. 401 (1900).

nishment, laid stress on the fact that the debt also was foreign, as if both elements were necessary to a refusal of jurisdiction.[38]

But the notion that garnishment is an ordinary action against the garnishee in combination with another personal action, an action against the principal debtor, has led the courts gradually to decide that garnishment proceedings will lie in any place in which personal jurisdiction may be obtained over the garnishee. In short, the original conception of garnishment as a proceeding based on jurisdiction *in rem* over a thing has been entirely superseded by a conception of garnishment as a transitory personal action against the garnishee. This has usually been held, where the garnishee is a foreign corporation doing business within the state, and therefore, in a sense resident there, though not technically domiciled therein;[39] but has not been confined to incorporated garnishees.[40]

Efforts to limit this doctrine in certain cases have failed. Thus it has been urged that where a railroad runs into two states and is

[38] Mason *v.* Beebee, 44 Fed. 556 (1890) (debt payable elsewhere); Central Trust Co. *v.* Chattanooga R. & C. R. Co., 68 Fed. 685 (1895) (debt payable elsewhere); Reimers *v.* Seatco Mfg. Co., 30 L. R. A. 364, 17 C. C. A. 228, 37 U. S. App. 426, 70 Fed. 573 (1895) (debt payable elsewhere); Illinois C. R. Co. *v.* Smith, 19 L. R. A. 577, 70 Miss. 344, 12 So. 461 (1893) (debt payable elsewhere); Towle *v.* Wilder, 57 Vt. 622 (1885) (debt payable elsewhere).

[39] Mooney *v.* Buford & G. Mfg. Co., 18 C. C. A. 421, 34 U. S. App. 581, 72 Fed. 32 (1896); National F. Ins. Co. *v.* Ming, 7 Ariz. 6, 60 Pac. 720 (1900); Kansas City P. & G. R. Co. *v.* Parker, 69 Ark. 401, 86 Am. St. Rep. 205, 63 S. W. 996 (1901); Hannibal & St. J. R. Co. *v.* Crane, 102 Ill. 249, 40 Am. Rep. 581 (1882); Wabash R. Co. *v.* Dougan, 142 Ill. 248, 34 Am. St. Rep. 74, 31 N. E. 594 (1892); Pomeroy *v.* Rand, McN. & Co., 157 Ill. 176, 41 N. E. 636 (1895); Lancashire Ins. Co. *v.* Corbetts, 165 Ill. 592, 32 L. R. A. 640, 56 Am. St. Rep. 275, 46 N. E. 631 (1897); Roche *v.* Rhode Island Ins. Asso., 2 Ill. App. 360 (1878); Glover *v.* Wells, 40 Ill. App. 350 (1890); Missouri P. R. Co. *v.* Flannigan, 47 Ill. App. 322 (1892); Moore *v.* Chicago, R. I. & P. R. Co., 43 Iowa 385 (1876); Mooney *v.* Union P. R. Co., 60 Iowa 346, 14 N. W. 343 (1882); Burlington & M. River R. Co. *v.* Thompson, 31 Kan. 180, 47 Am. Rep. 497, 1 Pac. 622 (1884); Pittsburgh C. C. & St. L. Ry. *v.* Bartels, 108 Ky. 216, 56 S. W. 152 (1900); Harvey *v.* Great Northern R. Co., 50 Minn. 405, 17 L. R. A. 84, 52 N. W. 905 (1892); Howland *v.* Chicago, R. I. & P. R. Co., 134 Mo. 474, 36 S. W. 29 (1896); National F. Ins. Co. *v.* Chambers, 53 N. J. Eq. 468, 32 Atl. 663 (1895); Fithian *v.* New York & E. R. Co., 31 Pa. 114 (1857); Datz *v.* Chambers, 3 Pa. Dist. R. 353 (1894); Virginia F. & M. Ins. Co. *v.* New York Carousal Mfg. Co., 95 Va. 515, 40 L. R. A. 237, 28 S. E. 888 (1898); Neufelder *v.* German American Ins. Co., 6 Wash. 336, 22 L. R. A. 287, 36 Am. St. Rep. 166, 33 Pac. 870 (1893); Pennsylvania R. Co. *v.* Rogers, 52 W. Va. 450, 62 L. R. A. 178, 44 S. E. 300 (1903).

In Holt *v.* Ladd, 71 Vt. 204, 44 Atl. 69 (1899) garnishment was allowed where the debt was contracted within the state.

[40] Balk *v.* Harris, 198 U. S. 215, 25 Sup. Ct. 125, 49 L. ed. 1023 (1904).

chartered in each it is impossible to reach the foreign corporation within whose state the garnished claim arose.[41] So in a few cases garnishment is denied where to allow it would enable the creditor to evade the local law as to exemptions.[42] These limitations are unsound; but an exception must probably be allowed in the case of a judgment, which cannot be reached by garnishment proceedings outside the state in which it was rendered.[43]

Since the decision of a garnishment suit is a judgment, and is protected as such by the Supreme Court of the United States, that court obviously has the last word on the subject. The history of the question in that court is peculiar. No case appears to have been carried to the court until recently. In the case of Chicago, Rock Island and Pacific Railway v. Sturm [44] the court held that a judgment against a resident garnishee was binding although the principal debtor was absent. The reasoning of the court was open to criticism, especially the attempted distinction between the right of the creditor and the obligation of the debtor, and led the Court into an untenable decision. As a result in Harris v. Balk [45] the court quite ignored the nature of the proceeding as *quasi in rem*, and held that a garnishee could be held in any jurisdiction where he may be served with process. Mr. Justice Peckham said:

"We do not see how the question of jurisdiction *vel non* can properly be made to depend upon the so-called original *situs* of the debt, or upon the character of the stay of the garnishee, whether temporary or permanent, in the state where the attachment is issued. Power over the garnishee confers jurisdiction on the courts of the State where the writ issues. If, while temporarily there, his creditor might sue him there and

---

[41] Wells *v.* East Tennessee V. & G. Co., 74 Ga. 548 (1885). *Contra*, Holland *v.* Mobile & O. R. Co., 16 Lea 414 (1886); Mobile & O. R. Co. *v.* Barnhill, 91 Tenn. 395, 30 Am. St. Rep. 889, 19 S. W. 21 (1892); Georgia & A. R. Co. *v.* Stollenwerck, 122 Ala. 539, 25 So. 258 (1898).

[42] Drake *v.* Lake Shore & M. S. R. Co., 69 Mich. 168, 13 Am. St. Rep. 382, 37 N. W. 70 (1888). *Contra*, R. R. *v.* Sturm, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. ed. 1144 (1899); Williams *v.* St. Louis & S. W. R. Co., 109 La. 90, 33 So. 94 (1902). And see Goodwin *v.* Clayton (N. C.), 67 L. R. A. 33, 49 S. E. 173 (1904.)

[43] Boyle *v.* Musser-Sauntry Land, Logging & Mfg. Co., 88 Minn. 456, 97 Am. St. Rep. 538, 93 N. W. 520 (1903); Tourville *v.* Wabash R. Co., 148 Mo. 614, 71 Am. St. Rep. 650, 50 S. W. 300 (1899); Noble *v.* Thompson Oil Co., 79 Pa. 354, 21 Am. St. Rep. 66 (1876).

[44] 174 U. S. 710, 19 Sup. Ct. 797, 43 L. ed. 1144 (1899).

[45] 198 U. S. 215, 25 Sup. Ct. 625, 49 L. ed. 1023 (1904).

recover the debt, then he is liable to process of garnishment, no matter where the *situs* of the debt was originally."

This language would have force if the process were merely to enjoin payment of the garnishee's debt until the other parties could be brought to a settlement. But the process of garnishment does not stop with an injunction against paying the debt. It results in a judicial discharge of the debt; and what power has the court into whose territory a debtor temporarily comes to discharge the debt as against the absent creditor? Or, for that matter, what power has the court of the debtor's domicil? It cannot discharge the debt by proceedings in insolvency;[46] nor will a bill in equity lie to adjust rival claims to payment where one of the rivals is absent.[47] The decision is absolutely opposed to the decisions of many of the best courts in this country.[48]

Garnishment obviously can be just only when it results in a discharge of the garnishee from his debt. Justice requires that if a garnishee is called upon to pay his debt to the plaintiff he shall be absolutely protected against suit by the defendant in another jurisdiction. It is impossible, however, for the court which allows garnishment proceedings to protect the garnishee against a suit in another jurisdiction for the recovery of a debt unless the principal defendant is himself subject to the jurisdiction of the court; for if he was not a party to prior proceedings they are not as to him *res judicata* and he may therefore sue in another state to recover payment. The garnishee, to be sure, would be entitled to equity protection in so far as he had actually paid the creditor's debt but the burden would be upon him to prove the existence of the debt.

[46] Ogden *v.* Saunders, 12 Wheat. (U. S.) 213 (1827); Phœnix Nat. Bank *v.* Batcheller, 151 Mass. 589, 24 N. E. 917 (1890).

[47] Mahr *v.* Norwich U. F. I. Society, 127 N. Y. 452, 28 N. E. 391 (1891).

[48] In addition to the cases cited in notes 33 and 34, *ante*, see the following cases: Louisville & N. R. R. *v.* Dooley, 78 Ala. 524 (1885); Louisville & N. R. R. *v.* Nash, 118 Ala. 477, 23 So. 825 (1897); Green *v.* Farmers' & C. Bank, 25 Conn. 452; Central R. Co. *v.* Brinson, 109 Ga. 354, 77 Am. St. Rep. 382, 34 S. E. 597 (1899); McBee *v.* Purcell Nat. Bank, 1 Ind. Terr. 288, 37 S. W. 55 (1896); Bush *v.* Nance, 61 Miss. 237 (1883); Keating *v.* American Refrigerator Co., 32 Mo. App. 293 (1888); Walker *v.* N. K. Fairbanks & Co., 55 Mo. App. 478 (1893); Wright *v.* Chicago, B. & Q. R. Co., 19 Neb. 175, 56 Am. Rep. 747, 27 N. W. 90 (1886); American Cent. Ins. Co. *v.* Hettler, 37 Neb. 849, 40 Am. St. Rep. 522, 56 N. W. 711 (1893); Bullard *v.* Chaffee, 61 Neb. 83, 51 L. R. A. 715, 84 N. W. 604 (1900); Morawetz *v.* Sun Ins. Office, 96 Wis. 175, 65 Am. St. Rep. 43, 71 N. W. 109 (1897).

He is now protected to be sure in all states of the Union by the constitutional provision for full faith and credit to the judicial proceeding of other states; for the supreme court has held not only that there is jurisdiction for garnishment in any court which has personal jurisdiction over the garnishee, but also that the garnishment process discharges the debt of the garnishee in so far as he pays it in that process; and therefore that he may plead this judicial discharge in any other state of the United States. The Constitution, however, is without power to protect the garnishee in another country; and when he is forced to pay under such circumstances he is, therefore, forever barred from spending the summer in European travel or a winter in Cuba except at the risk of being forced again to pay the debt from which the Supreme Court of the United States would vainly have tried to discharge him. The English courts, at least, would probably deny the effect of the discharge.[49]

Even the Supreme Court of the United States could not protect the garnishee against the obligation to pay the debt again in the interesting case of Ward v. Boyce.[50] A "trustee process" had been brought in Vermont against the husband of the present plaintiff as principal debtor and the present defendant as trustee. The debt was a promissory note claimed to belong to the husband; and in Vermont it was adjudged that the trustee owed the absent husband, and he was forced by the trustee process to pay the note. He is now sued in New York by the wife, who proves her title to the note. The court is, therefore, compelled to give judgment for the wife, and to hold that the debt had not been paid as a result of the trustee process; because, as the court said, the existence of the trusteed debt was a necessary jurisdictional fact, and since the debt alleged, that is, a debt due to the husband, did not in fact exist, the Vermont proceedings were *coram non judice.*

This, however, is not the only objection to the garnishment process as it has been developed by the courts. It is unjust not only to the garnishee but also and chiefly to the principal defendant; for it permits him to be subjected to doubtful or even fraudulent claims without redress. An owner of property may determine the situs of the property he owns, and may justly be subjected

[49] Gibbs *v.* Société Industrielle, 25 Q. B. D. 399; Mayor of London *v.* Cox, L. R. 2 H. L. 239 (1890).

[50] 152 N. Y. 191, 36 L. R. A. 549, 46 N. E. 180 (1897).

to the action of the courts within whose territory his property is found. The creditor, however, has no power to fix the personal presence of his debtor at one place or another. For all the creditor can do, the debtor may travel where he will. It is, therefore, unjust to submit the creditor's claim to the accident of the debtor's presence in one state or another. Yet, according to the current doctrine, if the debtor is travelling a thousand miles away from the creditor's domicil he may there be garnished and be compelled to pay a claim which is alleged to be a legal claim against the creditor. To be sure if the creditor happens to have notice of the suit, which can usually be obtained only by careful reading of the newspaper published where the suit is brought, he has a right to defend himself; but unless the claim as made in the garnishment proceedings is a very large one it will hardly pay him to travel across the country in order to meet the charge, taking with him his evidence. Without doing so, his effort to disprove the claim, however groundless it may be, is practically hopeless; the absent is always wrong, just as surely in court as in the outside world. He may send on his deposition; but a deposition is of very little force against the actual living testimony of the plaintiff. He may employ counsel; but counsel is helpless without witnesses. Garnishment, therefore, is practiced at the present day as a safe and easy instrument of fraud.

The practical objection to the established rule has never been more forcibly stated than by Willes, J., in Mayor of London v. Cox.[51]

"A foreign merchant, say at New York or San Francisco, opens an account at Lafitte's [in Paris], or at Coutt's, to meet bills which he has accepted, or pay for French or English merchandise. Is it to depend upon whether Lafitte happens to visit London and walk into the City, or whether Coutt's do business in the City through one of the firm, or only through the intervention of a clerk, that the Mayor's Court shall have jurisdiction to attach the balances in Paris or in London to answer a foreign claim, which may be bad or indifferent, but is good enough to procure the dishonor of the bills, and to destroy the foreign merchant's credit before he can take means to dissolve the attachment? The defendant may have an answer, by way of payment, or release,

[51] L. R. 2 H. L. 239, 268.

or discharge by the law of his own country, which he may despair of establishing according to the rules of evidence used in a foreign jurisdiction; or a bar by way of prescription, which, as being matter of procedure, will be inadmissible there. The place where he is sued may thus be all-important; and shall it depend upon the will of his debtor, who is in default, to elect for him a jurisdiction? That would be to affect A. by the unauthorized act of B., over whom he has no control; and, therefore, it is not merely different from law, which a valid custom may be, but contrary to a principle of justice, which no valid custom can be."

It is submitted that the French method of dealing with the problem is far preferable to our own. This process begins with an injunction (saisie-arrêt) against the garnishee paying the debt to the principal defendant; this process is, of course, in the garnishee's court. A suit between the principal parties follows, to determine the validity of the principal claim; and that suit is brought in the court which has jurisdiction of that particular claim, that is, the court of the principal debtor. If judgment issues against the defendant in that suit, it may be enforced by payment of the garnished debt into court to discharge it. The process is clearly illustrated in a judgment of the Civil Tribunal of the Seine,[52] which has been translated as follows:

"THE COURT. Todesco, an Austrian subject domiciled at Vienna, alleges that Dumont, a German without known domicil at Paris, residing in London, should be ordered to pay him 44,700.95 francs, the amount of a note made by Dumont to Todesco, dated Augsburg, March 9, 1876, registered at Paris, Aug. 16, 1889. Todesco further prays the court to validate the garnishment made by him upon this note, on Betzold, a banker of Paris, Aug. 16, 1889. Incidentally Todesco moves that the question of validation be continued until a competent court has passed on the validity of the principal obligation. Dumont pleads to the jurisdiction of this court, on the ground that the parties are foreigners, and the obligation was contracted in another country.

"Though the court is incompetent in such a case to determine, as between strangers, the existence of the obligation, it is on the contrary competent to pass upon the legality of an attachment or of a

[52] Todesco *v.* Dumont, 18 Clunet 559; translated, 1 Beale, Cases on Conflict of Laws, 434.

levy of execution resulting from a garnishment made within its jurisdiction. It ought always to grant a continuance to the attaching creditor to enable him to prove his claim before a competent court, on penalty, in case of failure to do so, of nullity of the whole process.

"On these grounds the court has jurisdiction only of the question of the validity of the garnishment. A continuance is granted for six months from this date, within which time, on penalty of nullity, Todesco shall sue said Dumont, on the principal obligation, before a court of competent jurisdiction."

Joseph Henry Beale.

HARVARD LAW SCHOOL.